

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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**REASONING ACCOMPANYING A PRE-APPEAL BRIEF REQUEST FOR REVIEW**

The applicants file herewith a Notice of Appeal and respectfully request review of this application prior to filing an appeal brief.

In response to the office action mailed June 12, 2008, the applicants submitted amendments to the claims to overcome Williams et al. (U.S. 5,945,988) (hereinafter "Williams") and Maissel et al. (U.S. 2003/0088872) (hereinafter "Maissel"). The amendments included new independent claims 194, 200, 206, and 212. The next office action, mailed January 21, 2009, finally rejected claims 182-212 using Williams and Maissel. In response to the final office action, the applicants canceled claims 182-193, stated that the final office action did not properly address each of the recitations of claims 194, 200, 206, and 212, and offered further reasons that Williams and Maissel do not teach or suggest claims 194, 200, 206, or 212. The advisory action dated April 17, 2009, maintained the rejections of claims 194, 200, 206, and 212 made in the final office action. As explained below, the rejections under 35 U.S.C. § 103 are based on a mistake of fact and are not proper. Thus, the applicants respectfully request allowance of the claims or the reopening of prosecution, as the review panel sees fit.

**The Rejections Under 35 U.S.C. § 103**

The advisory action mailed April 17, 2009, asserts that all claim limitations were treated equally. The applicants respectfully disagree for at least the following reasons: 1) claims 194, 200, 206, and 212 include recitations that are not present in claims 182-193 and were not treated in either the final office action or the advisory action and, thus, it is improper for an office action to reject claims 194, 200, 206, and 212 as "properly treated and incorporat[ing] the claim limitations in claims 182-183;" 2) neither Williams nor Maissel teaches or suggests determining

a first probability that an audience member is in the audience based on a first viewing count (i.e., a number of times that a first audience member was logged in to a measurement apparatus) and a second viewing count (i.e., a number of times that a second audience member was logged in to the measurement apparatus) (i.e., the probability one audience member is present is dependent on another audience member); 3) neither Williams nor Maissel teaches or suggests a count that is not equal to a number of audience members that are logged in to a measurement apparatus at a first location; and 4) neither Williams nor Maissel teaches or suggests determining an expected number of audience members based on historical tuning information for known audience members during corresponding day parts. Each of these reasons is more fully explained below.

1. Claims 194, 200, 206, and 212 each include recitations not present in claims 182 or 183. These recitations were not addressed in either the final office action or the advisory action. For example, claim 194 recites, *inter alia*, determining a first probability that the first audience member is in the audience based on the first viewing count and the second viewing count. While the final office action groups claims 182-212 together for the purposes of rejecting the claims under 35 U.S.C. § 103, both the final office action and the advisory action are devoid of attention to the foregoing recitation. See *final office action mailed January 21, 2009, pages 3-7*. Claims 200 and 206 each include a recitation that was not properly treated in either the final office action or the advisory action.

Additionally, claim 212 recites, *inter alia*, determining an expected number of audience members based on historical tuning information for known audience members during corresponding day parts, and determining whether the expected number of audience members is greater than a first threshold. The final office action and the advisory action also fail to address this recitation, but still group claim 212 in with claims 182-211 for purposes of rejection. The advisory action also fails to properly address the recitations of claim 212. In view of the foregoing, the rejections of claims 194, 200, 206, and 212 are improper at least because a prima facie case of obviousness has not been made.

2. Claim 194 recites, *inter alia*, determining a first probability that an audience member is in the audience based on a first viewing count and a second viewing count. The office action cites Williams for describing the recitation. The portion of Williams that comes nearest to describing this recitation is 8:64-9:63, which still fails to teach or suggest the claim recitation. Specifically, Williams describes calculating a user metric for the information in a behavior log as well as the current system settings for each of the known system users. See *Williams, 8:65-9:2*. If there is a greater than predetermined probability that the information in the behavior log matches the user profile of one of the known users, the system of Williams determines that a match has been

made. See *Williams*, 9:25-28. To generate the metric, each of the configurable options is given a different predetermined weight and the weighted values are added together. See *Williams*, 9:43-46. The sum of the weighted values is compared to a predetermined value, and the system determines that a match has been found if the sum of the weighted values is higher than the predetermined value. See *Williams*, 9:48-51.

Contrary to the assertion of the office action, Williams does not teach or suggest determining a first probability that an audience member is in the audience based on a first viewing count (i.e., a number of times a first audience member is logged in to a measurement apparatus during a day part of a monitored day as recited in claim 194) and a second viewing count (i.e., a number of times a second audience member is logged in to a measurement apparatus during a day part of a monitored day as recited in claim 194). The probability that a user is using the system described in Williams is based completely on a single user's previous behavior and is not based on any other user's behaviors. See *Williams*, 9:22-63. Williams does not teach or suggest the user metric being based on another user's previous behavior.

The applicants recognize that, according to Williams, a second user metric (i.e., probability that the second user is the system user) may be compared to the predetermined threshold if the first user metric does not exceed the threshold. However, the second user metric is still only based on the second user's previous behavior, and is not based on any other user behavior or metric. While the comparison of the user metric to the predetermined value may or may not be conditional on another user's probability being too low or too high, the probability is not based on any other user's probability or behavior. Therefore, Williams does not teach or suggest determining a first probability that an audience member is in the audience based on a first viewing count and a second viewing count. Maissel does not overcome this deficiency.

3. Neither Williams nor Maissel teaches or suggests performing an action (e.g., presenting a prompt for user identification) when a count (i.e., a count of audience members in an audience at a first location during a day part of a monitored day) is not equal to a number of audience members that are logged in to a measurement apparatus at a first location. The office action admits that Williams does not deal with audience counts, and puts forth Maissel to cure the admitted deficiency. See *office action*, page 6. However, Maissel also does not teach or suggest a count not equal to a number of audience members that are logged in to a measurement apparatus at a first location. Maissel describes viewer identification information obtained using methods well-known in the art, such as requiring viewers to input a PIN. See *Maissel* [0171]. Maissel also describes computing real-time information on a proportion or percentage of an audience viewing a particular program. See *Maissel*, [0246]. As discussed in Maissel, the

system computes the proportion of a large audience watching a program and transmits the information to users. See *id.* The proportion of the audience includes the logged-in viewer data at a first location. See *Maissel*, [0243, 0246].

As used in *Maissel*, the count of audience members in an audience at a first location could never be different from the number of audience members logged in at the first location, and is therefore indistinguishable therefrom. At best, *Maissel* derives the count of audience members from the number of audience members logged in via PIN. See *Maissel*, [0171, 0246]. As a result, the count of audience members will always be equal to the number of audience members logged in. *Maissel* cannot teach or suggest a count of audience members in an audience at a first location that is distinguishable from a number of audience members logged in at the first location, and certainly cannot teach or suggest performing an action when the count and the number of audience members logged in are different because the count and number of audience members logged in are never different.

Claims 200 and 206 recite an article of manufacture and an apparatus, respectively, to determine a first probability that the first audience member is in the audience based on the first viewing count and the second viewing count, and wherein a count is not equal to a number of audience members that are logged in to a measurement apparatus at a first location. As described above, *Williams* and *Maissel* cannot teach or suggest such a recitation. Therefore, claims 194, 200, 206, and all claims depending therefrom, are allowable over *Williams* and *Maissel*.

4. Regarding claim 212, *Williams* is not concerned with an expected number of audience members present in an audience of a program, and certainly does not compare an expected number to a threshold. Rather, *Williams* is concerned with identifying a single active user and then activating that individual user's preferences. See *Williams*, 5:8-36. The advisory action asserts that the system of *Williams* does not determine a single user, and directs attention to *Williams*' description of monitoring and storing behavior logs for multiple users, and providing channel/programming suggestions to the user based on the behavior log. See *advisory action*, page 3. The applicants do not dispute that *Williams* describes a behavior log for multiple users and providing channel/programming suggestions to the user, but this description does not provide any teaching or suggestion for determining an expected number of audience members based on historical tuning information for known audience members during corresponding day parts, and determining whether the expected number of audience members is greater than a first threshold. Additionally, a user's favorite times, channels, etc., do not result in an expected number of audience members.

While Williams can provide background services for persons not currently using the system, only the preferences for one particular user may be operative at any given time. Additionally, Williams cannot be modified to expect a number of users, because Williams is directed to automatically determining and updating user preferences. See *Williams, Abstract*. Per Williams, sets of user preferences are mutually exclusive by definition, as identical user preferences would eliminate the need for defining the preferences of individual users and activating multiple user preferences simultaneously would result in conflicts between settings. Thus, Williams is concerned with identifying one system user at a time.

After identifying the user of the system, Williams is not concerned with identifying additional users, and thus does not count the number of audience members or expect such a number of audience members. Therefore, Williams does not teach, and cannot be modified to teach, determining an expected number of audience members based on historical tuning information for known audience members during corresponding day parts, and determining whether the expected number of audience members is greater than a first threshold.

Maissel does not overcome the deficiencies of Williams. Maissel describes displaying “a proportion of an audience viewing a program,” but the proportion of an audience is a determined number based on a wide audience as opposed to an expected number. See *Maissel, [0078-0080]*. Maissel does not teach or suggest determining an expected number of audience members and determining whether the expected number is greater than a first threshold. Therefore, no combination of Williams and Maissel can teach claim 212.

In view of the foregoing remarks, reconsideration of the application and allowance thereof are respectfully requested. If there is any matter that the examiner would like to discuss, the examiner is invited to contact the undersigned representative at the telephone number set forth below.

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